

## REMARKS

The above Amendments and these Remarks are in reply to the Office Action mailed November 16, 2006. Claims 1-71 were pending in the Application prior to the outstanding Office Action. Claims 1, 19, 37, 47 and 62 are being amended. The amendments to Claims 1, 19, 37, 47 and 62 and are supported in the original disclosure at least at paragraphs [0007], [0015], [0021] and [0032]. Claims 68-71 are withdrawn. Claims 1-67 remain for the Examiner's consideration. Reconsideration and withdrawal of the rejections are respectfully requested.

### CLAIM REJECTIONS UNDER 35 U.S.C. § 103

Claims 1, 3-4, 6-12, 14-20, 23-27, 29-31 and 33-36 are rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over Zucherman et al. (U.S. Patent No. 6,048,342), hereinafter '342, in view of Brantigan (U.S. Patent No. 4, 834,757), hereinafter '757, and in view of Branch (U.S. Publication No. 2002/0016592), hereinafter '592.

Amended Claim 1 contains the limitations that the “wherein the tissue expander is at least in part radiolucent, wherein the partially radiolucent tissue expander distracts the soft tissue and the spinous processes while not impairing the ability to view the spinous processes in an x-ray”. Since '342, '757 or '592 did not teach or suggest this limitation, Claim 1 was not obvious at the time the invention was made.

Amended Claim 19 contain the limitations that the “wherein the spacer is at least in part radiolucent, wherein the partially radiolucent tissue expander distracts the soft tissue and the spinous processes while not impairing the ability to view the spinous

processes in an x-ray". Since '342, '757 or '592 did not teach or suggest this limitation, Claim 19 was not obvious at the time the invention was made.

Claims 3-4, 6-12, 14-18, 20, 23-27, 29-31 and 33-36 all directly or indirectly depend from independent Claims 1 and 19, and are therefore believed patentable for at least the same reasons as the independent Claims 1 and 19 and because of the additional limitations of these claims.

Claims 2, 13, 21-22, 63 and 66 are rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over '342, '757, and '592 as applied to claims 1, 19 and 62 and further in view of U.S. Patent No. 5,192,327 to Brantigan (hereinafter '327).

Amended Claim 62 contains the limitations that "the radiolucent tissue spacer and expander enable the implant to retain a high degree of structural support after being implanted while not impairing the ability to view the spinous processes in an x-ray". Since '342, '757 or '592 did not teach or suggest this limitation, Claim 62 was not obvious at the time the invention was made.

Claims 2, 13, 21-22, 63 and 66 all directly or indirectly depend from independent Claims 1, 19 and 62, and are therefore believed patentable for at least the same reasons as the independent Claims 1, 19 and 62 and because of the additional limitations of these claims.

Claims 5 and 28 are rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over '342, '757, and '592 as applied to claims 1 and 19 and further in view of U.S. Publication 2001/0012938 to Zucherman (hereinafter '938).

Claims 5 and 28 all directly or indirectly depend from independent Claims 1 and 19, and are therefore believed patentable for at least the same reasons as the independent Claims 1 and 19 and because of the additional limitations of these claims.

Claims 37-41, 43-55 and 57-61 are rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over '342, '327, and '592.

Amended Claims 37 and 47 contain the limitations that the “wherein the spacer is at least in part selected from the group consisting of polyetheretherketone, polyetherketoneketone, and polyaryletheretherketone, wherein the tissue expander distracts the soft tissue and the spinous processes while not impairing the ability to view the spinous processes in an x-ray”. Since '342, '757 or '592 did not teach or suggest this limitation, Claims 37 and 47 were not obvious at the time the invention was made.

Claims 38-41, 43-46, 48-55 and 57-61 all directly or indirectly depend from independent Claims 37 and 47, and are therefore believed patentable for at least the same reasons as the independent Claims 37 and 47 and because of the additional limitations of these claims.

Claims 42 and 56 are rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over '342, '327, and '592 as applied to claims 37 and 47 and further in view of '938.

Claims 42 and 56 all directly or indirectly depend from independent Claims 37 and 47, and are therefore believed patentable for at least the same reasons as the independent Claims 37 and 47 and because of the additional limitations of these claims.

Claims 62, 64-65 and 67 are rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over ‘342, ‘757, and ‘592.

Amended Claim 62 contains the limitations that “wherein the body and the shaft are radiopaque, and further wherein the spacer and the tissue expander are radiolucent, wherein the partially radiolucent tissue expander distracts the soft tissue and the spinous processes while not impairing the ability to view the spinous processes in an x-ray”. Since ‘342, ‘757 or ‘592 did not teach or suggest this limitation, Claim 62 was not obvious at the time the invention was made.

Claims 64-65 and 67 all directly or indirectly depend from independent Claim 62, and are therefore believed patentable for at least the same reasons as independent Claim 62 and because of the additional limitations of these claims.

Claims 63 and 66 are rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over ‘342, ‘757, and ‘592 and further in view of ‘327.

Claims 63 and 66 all directly or indirectly depend from independent Claim 62, and are therefore believed patentable for at least the same reasons as independent Claim 62 and because of the additional limitations of these claims.

In view of the above, Applicants respectfully request that the Examiner reconsider and withdraw the 103(a) rejections.

## CONCLUSION

In light of the above, it is respectfully requested that all outstanding rejections be reconsidered and withdrawn. The Examiner is respectfully requested to telephone the undersigned if he can assist in any way in expediting issuance of a patent.

The Commissioner is authorized to charge the required fees any underpayment of fees or credit any overpayment to Deposit Account No. 06-1325 for any matter in connection with this reply, including any fee for extension of time, which may be required.

Respectfully submitted,

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